IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 25, 2006

FREDERICK MORROW v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Robertson County
No. 9676 John H. Gasaway, III, Judge

No. M2005-00554-CCA-R3-PC - Filed July 11, 2006

Pursuant to a bench trial, Petitioner, Frederick Morrow, was found guilty of one (1) count of civil rights intimidation, one (1) count of first degree felony murder in the perpetration of an attempted aggravated kidnapping and one (1) count of attempted aggravated kidnapping. Petitioner was sentenced to life in prison for first degree murder. He was sentenced as a Range I offender to consecutive terms of four (4) years for civil rights intimidation and five (5) years for attempted aggravated kidnapping. On direct appeal, a panel of this Court found that the issues were without merit and accordingly affirmed the convictions. Petitioner then filed an untimely Rule 11 application with the Tennessee Supreme Court appealing the decision of the Court of Criminal Appeals affirming his convictions. The application was denied. The trial court then granted Petitioner an additional sixty (60) days in which to file a timely Rule 11 application with the Supreme Court. That application was likewise denied. Petitioner next filed a petition for post-conviction relief. Following an evidentiary hearing, the post-conviction court granted a delayed appeal to the Tennessee Supreme Court and stayed the post-conviction proceedings pending disposition of that appeal. Petitioner's appeal was denied and the post-conviction court then denied his petition for post-conviction relief. On appeal, Petitioner argues that he is entitled to post-conviction relief because he did not knowingly, voluntarily, and intelligently waive his right to a trial by jury, and because the trial court, sitting without a jury, failed to consider lesser included offenses of felony murder and premeditated first degree murder. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

William F. Kroeger, Springfield, Tennessee, for the appellant, Frederick Morrow.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Dent Morriss, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The opinion of this court in the direct appeal set forth the facts in this case as follows:

> On January 14, 1995, Michael and Hannah Westerman were traveling from their home in Kentucky to Springfield, Tennessee, to do some shopping and have dinner. From the back of the Westermans' Chevrolet pick-up truck flew a Confederate battle flag, which was attached to a pole mounted on the truck's tool box. On their way to Springfield, the Westermans stopped at Janie's Market in Guthrie, Kentucky, to get some gas. Mr. Westerman paid for the gas, and while he and Mrs. Westerman sat in the truck talking, Mrs. Westerman noticed a black man in a dark blue car pointing at them.
>
> Mr. Westerman pulled the truck onto the road, and as they crossed into Tennessee, Mrs. Westerman noticed two (2) cars, one light blue and the other dark blue, following them. Mr. Westerman passed a car in front of them, and both blue cars were able to catch up with the Westermans. Although the Westermans' truck was traveling at approximately 85 miles per hour, the light blue car began to pass them on the left. Mr. Westerman pushed Mrs. Westerman on the floorboard of the truck as the car passed them. After the car passed, Mrs. Westerman sat up in her seat, and Mr. Westerman told her that he had been shot.
>
> Mrs. Westerman climbed over to the driver's side so that she could drive the truck. Suddenly, the light blue car came to a complete stop in the middle of the road in front of the Westermans' truck, and Mrs. Westerman saw a black man sitting in the car pointing a gun at the truck. The dark blue car which had been following the Westermans completely stopped behind the Westerman vehicle, and Mrs. Westerman was forced to drive through a ditch, across an embankment and into a parking lot in an attempt to flee the scene. However, because the two cars had blocked her access to the paved driveways into the parking lot, Mrs. Westerman had to cross another ditch in order to exit the parking lot. Mrs. Westerman then proceeded in the opposite direction, towards Guthrie, in an effort to seek medical attention for her husband and avoid further confrontation with the individuals in the blue cars.
>
> Mr. Westerman died the next day at Vanderbilt Hospital as a result of a gunshot wound to the heart.
>
> Shortly after the incident, the police developed appellant Darden as a suspect in the shooting. While law enforcement authorities were conducting an interview with Darden concerning the incident, appellant Morrow appeared at the police station and confessed to the shooting. In his statement to the police, Morrow acknowledged

that he was a passenger in Darden's car when he shot several times at the Westermans' truck. He stated that they chased the Westermans after someone in the truck shook the Confederate flag at them and shouted a racial epithet.

At the time the incident occurred, both Morrow and Darden were seventeen (17) years of age. Tony Andrews and Marcus Merriweather, other passengers in Darden's car during the incident, were also juveniles. Andrews was seventeen (17) years of age, and Merriweather was fifteen (15) years of age. All four were charged in juvenile court with the delinquent act of premeditated first degree murder, and upon a transfer hearing in that court, were transferred to the Robertson County Circuit Court to be tried as adults.

Subsequently, Darden, Morrow, Andrews and Merriweather were each indicted on one (1) count of civil rights intimidation, one (1) count of premeditated first degree murder, one (1) count of felony murder and one (1) count of attempted aggravated kidnapping. Andrews entered into a plea agreement with the state wherein he pled guilty to criminally negligent homicide and was placed on diversion for two (2) years. Merriweather was tried on the instant offenses in a joint trial with Morrow and Darden.

At trial, Andrews testified for the state. Andrews stated that on the afternoon of the incident, he and Darden were driving around Guthrie in Darden's light blue car. Merriweather and Morrow eventually joined them, and they went to a friend's house so that Darden could collect some money owed to him. While they were sitting in the car, they noticed a red pick-up with a Confederate flag on its toolbox driving by. Subsequently, they saw the pick-up truck parked at Janie's. Darden remarked that he wanted to fight the people in the truck and drove to a local hangout to inform others that he intended to fight the occupants of the truck. The group went back to Janie's, and the truck was still in the parking lot. The truck then began to pull out of the parking lot, and when the truck was beside Darden's car, Morrow rolled his window down and began pointing at the flag. Andrews testified that he then saw someone reach out of the truck's back window and shake the Confederate flag.

Darden's car then pulled out of Janie's parking lot and alongside a car containing Robert Bell, Ricky Williams and Michael Mimms. Octavius Burks and Marcus Darden were in another car behind Bell's. When the Westerman truck began to exit Janie's, Appellant Darden remarked, "there it goes." Bell and Burks began to follow the truck, and the Darden car turned around and followed as well. The Darden car was approximately four (4) cars behind the Westerman truck, and Morrow told Darden to "catch" Bell. At this point, Morrow informed the other occupants of the car that he was armed.

The Darden car caught up with Burks and Bell and eventually passed both cars, putting them directly behind the Westerman truck. Darden's car was traveling approximately 70 to 80 miles per hour, and the truck began to speed up in front of them. Darden began to speed up, and Andrews heard shots fired from the back seat on the driver's side, where Morrow was sitting. Andrews turned around and saw Morrow leaning out of the window firing his gun. Bell was following the Darden car approximately three (3) to four (4) car lengths behind.

Because Morrow's gun jammed, he began fumbling with the weapon. Morrow then told Darden to pass the Westerman truck, and as they started to pass the truck on the left side, Andrews heard another shot fired from the same direction. When the car pulled alongside the Westerman truck, Andrews heard another shot fired from the back passenger seat. After they passed the truck, Andrews noticed that the truck slowed down. Darden began to slow down and then stopped his vehicle in the middle of the road. The truck stopped behind them, and Morrow leaned out of his window, pointed his gun at the truck and exclaimed, "[I've] got them now." The truck veered off into a ditch, and Morrow continued to fire his gun. Eventually, the truck was able to maneuver through the ditch, out of the parking lot and back onto the road proceeding in the opposite direction.

Morrow testified on his own behalf at trial. He stated that on the day of the incident, he was carrying a gun for protection because his life had been threatened. He testified that they followed the Westerman truck because all of the occupants in the car were "looking for a fight." Although he acknowledged that they wanted to fight because someone in the truck waved the Confederate flag, he insisted that he did not shoot at the truck because of the flag. Instead, he testified that as Darden began to pass the Westerman truck, Darden, Merriweather and Andrews started yelling, "shoot!" Because of the "pressure" from the others in the car, he started firing his gun into the air. He stated that he never told Darden to stop his car in the road and did not point his gun at the truck when the car was stopped. He further testified that he never intended to harm anyone during the incident.

Appellant Darden also testified for the defense at trial. He claimed that no one in the car discussed fighting with the occupants of the truck. He was offended when someone in the truck shook the flag, but had no intention of shooting anyone. He was chasing the truck to "mess" with its occupants and did not know that Morrow was armed. He denied that anyone in the car coerced Morrow into shooting his weapon. When he heard the gunshots, he assumed that the truck was merely "backfiring." He further denied stopping in the roadway or attempting to "box in" the Westermans' truck.

> At the conclusion of the proof, the trial court found both Morrow and Darden guilty of one (1) count of civil rights intimidation, one (1) count of first degree murder in the perpetration of an attempted aggravated kidnapping and one (1) count of attempted aggravated kidnapping. Merriweather was acquitted of all charges. Both Morrow and Darden were sentenced to life imprisonment for first degree murder. Morrow was sentenced as a Range I offender to consecutive terms of four (4) years for civil rights intimidation and five (5) years for attempted aggravated kidnapping. Darden received Range I sentences of three (3) years for civil rights intimidation and four (4) years for attempted aggravated kidnapping, to run concurrently with each other but consecutively to the life sentence for first degree murder.

On direct appeal, the court found that the issues were without merit and accordingly affirmed the judgments of the trial court.

State v. Freddie Morrow and Damien Darden, No. 01C01-9612-CC-00512, 1998 WL 917802, at *1-4 (Tenn. Crim. App., at Nashville, Dec. 22, 1998), *motion for perm. to late file Tenn. R. App. P. 11 app. denied* (Tenn. June 22, 1999).

II. Post-Conviction Hearing

In his petition for post-conviction relief and at the hearing, Petitioner argued that trial counsel was ineffective in failing to file a timely petition for application to appeal to the supreme court, in failing to properly advise him regarding his constitutional rights to a jury trial, and in failing to request that the trial judge consider lesser included offenses of premeditated first degree murder and felony murder. He also argued that there was a variance between the indictment and the proof presented at trial in that the evidence did not satisfy the elements of the charge in the indictment. Finally, he argued that he was denied his right to confront his accuser when the trial judge refused to allow his trial counsel to question Ms. Westerman about her affiliation with certain race-related organizations.

Petitioner testified that his case received a lot of publicity, prompting his trial counsel to file a motion for change of venue. The motion contained various newspaper clippings and other things related to the media attention. The motion was presumably filed because the publicity had tainted the available jury pool in Robertson County. According to Petitioner, his trial counsel told him that the trial judge was going to deny the motion for change of venue. He then advised Petitioner to opt for a bench trial because the judge would be more likely to "lean in his favor." He told Petitioner that if he declined a jury trial, the trial judge would likely convict him of criminally negligent homicide and he would be released from prison by his next birthday. Petitioner said that trial counsel did not advise him that the trial judge would grant the motion for change of venue in the event Petitioner wanted a jury trial and a jury could not be selected in Robertson County.

Petitioner did not speak to anyone else about declining a jury trial. He did not know if his mother had discussed this decision with his trial counsel. He requested that his trial counsel speak to his co-defendants and obtain their opinions regarding a bench trial. He said that his trial counsel consistently told him that it would be a good idea to proceed to trial without a jury. Although trial counsel never discussed a list of names or possible jury panel members with him, Petitioner said that he received a questionnaire exemplifying the questions that potential jurors would be asked in trying to determine their suitability as jurors.

Petitioner signed a waiver approximately two days before his trial, waiving his right to a trial by jury. He stated that he did not recall signing the waiver, but he identified his signature on the waiver when it was presented to him by counsel. Petitioner initially did not remember speaking with the trial judge about his right to a jury trial and his decision to waive that right. However, after refreshing his memory with the transcript of his trial, he remembered speaking to the judge about waiving his right to a jury trial. He acknowledged that the trial judge told him he had a right to have a twelve member jury decide his case, but he did not recall being advised that he could participate in a jury trial. He also did not remember being told that he had a right to participate in selecting a jury.

Petitioner testified that he would not have waived his right to a jury trial had he known that the trial judge would grant a change of venue if a jury could not be selected. He did not feel like his waiver was an understanding and voluntary waiver because the decision to waive was made without all of the necessary information. Petitioner felt like he was coached into making the decision, that the waiver was signed on "false principles," and that the circumstances were not fully explained to him. He also said that his trial counsel never argued the motion for change of venue and never discussed this decision with Petitioner. Petitioner had completed the ninth grade of high school.

Petitioner testified that his original indictment charged premeditated first degree murder for which he was acquitted. He was not convicted of any lesser included offenses related to this charge. Petitioner said that his trial counsel had discussed the lesser included offense of criminally negligent homicide with him, but trial counsel did not request that the trial court consider lesser included offenses of premeditated first degree murder.

Collier Goodlett testified that he was Petitioner's trial attorney along with his co-counsel, Carlton Lewis. Mr. Goodlett worked at the Public Defender's Office in Clarksville. He recruited Mr. Lewis, an African-American lawyer from Nashville, because he felt that Mr. Lewis's presence would help the jury see Petitioner in a more favorable light. At the time of the post-conviction hearing, Mr. Goodlett's caseload consisted of 95 clients with approximately 130 matters pending before the court. He said that his caseload was "probably equivalent to that" at the time of Petitioner's trial.

Mr. Goodlett agreed that at the time of trial he thought that Petitioner had a "reasonably good shot at criminal[ly] [negligent] homicide," a lesser included offense of premeditated first degree murder. He said that his understanding of the facts, in brief form, were as follows:

> Mr. Morrow is with some friends of his. He sees the Westerman truck parked at a little mini mart, and our proof, essentially, was that Mr. Westerman sees them and reaches out through the back window of his truck and sort of shakes the flag at them.
>
> They - - both parties part company; ultimately they see the Westerman vehicle again, and the proof, essentially, was they wanted to fight them. And Mr. Morrow was, essentially, going to fire, in sort of nautical terms, a few shots across the [bow]. And, unfortunately, for all the parties concerned, including Mr. Morrow, he had the most horrible luck in the world, and ended up shooting and ultimately killing Mr. Westerman. And I felt like that was - - that was part of it.

Mr. Goodlett also indicated that the trial court's comments and questions during a pre-trial conference, in which counsel for both parties were present, led him to believe that it might be in Petitioner's best interest to waive his right to a jury trial. Based on his inferences drawn from the pre-trial conference and what knowledge he had of the jury pool, he advised Petitioner to waive his right to a jury trial. Mr. Goodlett felt that the trial court "would be able to more dispassionately look at the facts of the case and less of all the hoopla that was surrounding this case," and in his opinion, "the route to go was to take the jury out of the mix."

Mr. Goodlett said that he did not find it odd that the judge returned a verdict of not guilty with respect to the charge of premeditated first degree murder and therefore he did not raise the issue on appeal. He agreed that at the time of trial the law required the fact finder to consider all lesser included offenses. He also said that based on comments made during the pre-trial conference, he thought the trial court would consider the facts sufficient to support a conviction of a lesser included offense of premeditated first degree murder. He did not recall whether he specifically asked the judge to consider a lesser included offense, but added that he would certainly have advocated for a lesser culpability than first degree murder. He also stated that it was his opinion that the trial court considered the lesser included offenses, although there was no way to know for sure.

Mr. Goodlett remembered speaking to Petitioner about his "reading" of the jury pool and his feeling about what the court would do regarding the charges against him. He did not recall making any statements to Petitioner about when he would be released from prison should he be convicted of a lesser offense, but he noted that he might have talked about the possible ranges of punishment. According to Mr. Goodlett, he never made any statement to Petitioner that he would be out of prison by his next birthday, and none of the sentences contemplated were shorter than a year.

Mr. Goodlett admitted that he was concerned about Petitioner receiving a fair trial in Robertson County, and that concern primarily arose out of the "circus atmosphere" that surrounded the case. According to Mr. Goodlett, some people considered Mr. Westerman's death "the last debt in the civil war." He explained that there was extensive publicity and such groups as the Sons of the Confederate Veterans had representatives in the courtroom on more than one occasion. Mr. Goodlett recalled that he reviewed questionnaires for a jury panel and interviewed a jury expert who advised him that "this pool was not a pool before whom [Mr. Goodlett] wanted to try this case." He

remembered very few African-Americans being members of the jury pool. Mr. Goodlett said that it might have been prudent to argue the change of venue motion. However, given the law on change of venue and judicial inclination, he said, "I felt like I had the best deal with who was going to be sitting on the bench, and I wanted to take my chances with the court as opposed to a jury no matter where."

Mr. Goodlett did not remember telling Petitioner that the judge was not going to grant a change of venue. He likewise did not remember discussing the law on change of venue with Petitioner. Mr. Goodlett challenged the sufficiency of the evidence on appeal because it was his view that what occurred during the incident did not constitute an attempted kidnapping. He said that he did not address a variance between the indictment and the proof at trial because pursuant to motion practice and discovery he determined that the State's proof tracked the indictment and did not constitute a variance.

On cross-examination, Mr. Goodlett said that he stood by his trial work and the effort he put into Petitioner's case, and he felt like he provided effective assistance of counsel. He said that if he could do something over with respect to the case, he would have sought funds to procure the car door from the car Petitioner was riding in during the incident. He explained that had he done so, he might have better demonstrated to the jury that Defendant could not have aimed the gun at Mr. Westerman from his position in the car, which would have further emphasized how "horribly unlucky this whole event was."

Mr. Goodlett identified the petition for waiver of trial by jury which was signed by Petitioner, Mr. Goodlett, Mr. Lewis, and the trial judge. He did not remember where they were when the document was signed. He also did not remember a colloquy between the trial court and Petitioner establishing an oral waiver of Petitioner's right to a jury trial. However, after refreshing his memory with a portion of the transcript, Mr. Goodlett recalled that Petitioner acknowledged to the trial judge that he was knowingly and freely waiving his right to a jury trial and that he understood what he was doing.

According to Mr. Goodlett, he never explicitly told Petitioner that the judge would find him guilty of criminally negligent homicide. Mr. Goodlett said that he did not speak to Petitioner in terms of the constitutional right to a jury trial, but explained to him that his best chance of avoiding a verdict of premeditated murder, or any first degree murder charge, including felony murder, would be a bench trial. He said he felt like Petitioner knew what he was doing when he told the trial judge that he wanted to waive his right to a jury trial, and he likewise felt that Petitioner knew what he was doing when he signed the petition waiving that right.

Charles Damien Darden, one of Petitioner's co-defendants, testified that while awaiting trial in the Robertson County Jail, he and Petitioner participated in a conversation with their trial attorneys regarding the merits of a bench trial versus a jury trial. He said that during that conversation, Mr. Goodlett told Mr. Darden and Petitioner that if they waived a jury trial they had a better chance of getting out of the penitentiary before their next birthdays.

William Goodman represented Petitioner's co-defendant, Marcus Merriweather, at trial. Mr. Goodman recalled discussions about waiving a jury trial in favor of a bench trial. He explained that the possible jury pool contained approximately two African-Americans, and the case had already received a lot of publicity by the time the pool was gathered. According to Mr. Goodman, the limited jury pool and the heightened publicity made a bench trial the best option for adjudication.

Mr. Goodman's notes reflected that the change of venue motion was argued, and that the trial judge reserved judgment pending jury selection. Once all of the co-defendants waived a jury trial, the change of venue motion was moot, although it was still pending before the court. It was Mr. Goodman's understanding that had an acceptable jury been impaneled in Robertson County the defendants would have proceeded with a jury trial. However, if a jury could not be successfully impaneled, the change of venue motion would have been granted.

The post-conviction court found that the evidence did not support Petitioner's claim that trial counsel was ineffective in advising him to waive his right to a jury trial. The post-conviction court also found that the trial judge did not err by "failing to articulate on the record all of the lesser included offenses that he considered in rendering his judgment." On appeal, Petitioner argues that the post-conviction court erred when it determined that he was not entitled to post-conviction relief because (1) Petitioner did not knowingly, voluntarily, and intelligently waive his right to a jury trial, and (2) the trial court, sitting without a jury, failed to consider lesser included offenses of felony murder and premeditated first degree murder.

III. Standard of Review

To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. *See* T.C.A. § 40-30-110(f) (2003). "'Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the trial court as the trier of fact. *Henley v. State*, 960 S .W.2d 572, 579 (Tenn. 1997). Therefore, we afford the trial court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. *Id.* at 578.

IV. Analysis

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, "the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). To establish deficient performance, the petitioner must show that counsel's performance was below "the range

of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Moreover, because the petitioner must establish both prongs of the test, this court need not address both prongs if the petitioner has failed to establish either component. *Goad*, 938 S.W.2d at 370 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

A. Waiver of Jury Trial

Although the thrust of his petition focuses on the fact that he involuntarily and unknowingly waived his right to a jury trial, Petitioner briefly contends that trial counsel was ineffective in that he facilitated the unknowing and involuntary waiver. He argues that he was induced by trial counsel to proceed with a bench trial rather than a jury trial without being apprised of all the facts regarding his motion for change of venue. The change of venue was filed due to the extensive publicity surrounding the case and fear that there would be an unfavorable jury pool. Petitioner asserts that trial counsel told him the judge would not grant the change of venue and a bench trial would be his best option for avoiding a conviction of premeditated first degree murder or felony murder. He argues that in advising him to forego a jury trial, trial counsel failed to inform him that the trial judge would grant the motion for change of venue if a jury could not be successfully impaneled. Petitioner contends that he would not have waived his right to a jury trial had he known that the trial judge would grant the motion under these circumstances. Consequently, he argues that his decision to waive his right to a jury trial was based on "false principles." He also argues that his trial counsel failed to explain the constitutional aspects of waiving his right to a jury trial. Petitioner contends that "given the relevant circumstances surrounding the signing of the waiver of his right to trial by jury and the failure of counsel to adequately explain the Constitutional aspects of that right, his waiver was not voluntarily and understandingly entered."

Rule 23 of the Tennessee Rules of Criminal Procedure provides that "[i]n all criminal cases except small offenses, trial shall be by jury unless the defendant waives a jury trial in writing with the approval of the court and the consent of the district attorney general. The defendant may waive a jury trial at any time before the jury is sworn." Tenn. R. Crim. P. 23. Unless there is an execution of a waiver of the right to trial by jury, a defendant in a criminal case is entitled to have a jury empaneled to try the matter. *State v. Johnson*, 574 S.W.2d 739, 741 (Tenn. 1978). Although no particular form is required, waivers, in order to be valid, must be voluntarily, knowingly, and intelligently made. *See Patton v. United States*, 281 U.S. 312 (1930); *State v. Bobo*, 814 S.W.2d 353, 359 (Tenn. 1991). Generally speaking, the waiver "must be clearly and convincingly shown" by the record. *See generally State v. Tidwell*, 775 S.W.2d 379, 386 (Tenn. Crim. App. 1989); *Lee v. State*, 560 S.W.2d 82, 84 (Tenn. Crim. App. 1977). "If the defendant sees fit to waive [the right to trial by jury], it is permissible provided that waiver is made in accordance with the safeguards provided by the constitution and implementing statutes or rules of criminal procedure." *Bobo*, 814 S.W.2d at 359 (citing *State v. Durso*, 645 S.W.2d 753, 758 (Tenn. Crim. App. 1983). On appeal,

this court is bound to accept the trial court's factual findings unless the evidence preponderates against those findings. *State v. Kelly*, 603 S.W.2d 726, 729 (Tenn. 1980).

The post-conviction court found:

> With respect to [Petitioner's] argument that Mr. Goodlett was ineffective as defense counsel in that he did not adequately advise [Petitioner] regarding his constitutional right to a trial by jury and that the execution of the waiver of that right and the proceeding before the court in a bench trial was not properly done, the Court believes that the evidence falls short in that argument.
>
> Exhibits one and two, along with the testimony of Mr. Good[lett], and even the testimony of [Petitioner] here today convinces this Court that there was discussion had that rises to the level of proper representation about the choices between having a jury trial and waiving that right and having a bench trial. And the Court believes that the representation by Mr. Goodlett on that issue was sound; that it was within the bounds of what is expected of adequate representation, and that the Defendant's argument that that was ineffective assistance of counsel to the extent that it justifies having a new trial, the Court simply doesn't agree with and the Court finds that without merit.

The record establishes that Petitioner signed a type-written waiver of his right to a jury trial. The document was approved and signed by the trial judge as well as Petitioner and each of his two attorneys. The record also establishes that Petitioner participated in a colloquy with the trial judge in which he acknowledged that he had sufficient time to discuss his right to a jury with his attorneys, that he understood that he was entitled to a jury trial under the United States Constitution, and that his decision to waive that right was knowingly, freely, and voluntarily made. Petitioner failed to submit any evidence demonstrating that he was prejudiced by the waiver of his right to a jury trial. We conclude that the evidence in the record does not preponderate against the post-conviction court's findings that trial counsel was effective in advising his client to waive his right to a jury trial and that Petitioner knowingly, voluntarily, and intelligently waived his right to a trial by jury. Accordingly, Petitioner is not entitled to relief on this issue.

B. Lesser Included Offenses

Petitioner next argues that he is entitled to post-conviction relief because the trial court, sitting without a jury, failed to consider lesser included offenses of felony murder and premeditated first degree murder. The State responds that this issue is waived because Petitioner failed to raise the issue in his direct appeal. Generally, "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented," with certain exceptions not applicable in the present case. T.C.A. § 40-30-106(g).

A review of the transcript of the post-conviction proceedings reveals that the State did not assert the defense of waiver at the post-conviction hearing, but raised the issue for the first time in this Court. In failing to raise the issue of waiver in the post-conviction court, the State denied Petitioner an opportunity to rebut the presumption that this issue has been waived. *See* T.C.A. § 40-30-110(f) (2003) (providing that "[t]here is a *rebuttable presumption* that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived") (emphasis added)*; see also Walsh v. State*, 166 S.W.3d 641, 645-46 (Tenn. 2005). Accordingly, we conclude that the State's waiver argument has itself been waived. "Issues not addressed in the post-conviction court will generally not be addressed on appeal." *Walsh*, 166 S.W.3d at 645-46 (citing *Rickman v. State*, 972 S.W.2d 687, 691 (Tenn. Crim. App. 1997); *State v. White*, 635 S.W.2d 396, 397-98 (Tenn. 1982) (rejecting an argument presented by the State for the first time on appeal)). As such, the State may not raise the issue of waiver for the first time in this Court. *Walsh*, 166 S.W.3d at 645-46

Having addressed the State's argument, we must now determine whether the post-conviction court erred in finding that Petitioner's constitutional rights were not violated when the trial court, sitting as jury, failed to consider lesser included offenses to first degree premeditated and felony murder. The trial court found Petitioner guilty of civil rights intimidation, felony murder, and attempted aggravated kidnapping, but returned a not guilty verdict with respect to count two, premeditated first degree murder. Petitioner begins his argument by equating the role of a judge at a bench trial with that of a jury at a jury trial. He then asserts that the evidence adduced at trial was sufficient to support a conviction of criminally negligent or reckless homicide, lesser included offenses of premeditated first degree murder. He argues that the trial judge's verdict of not guilty on the charge of premeditated first degree murder indicates that the judge failed to consider these lesser included offenses during his deliberations. He argues that this failure was equivalent to failing to instruct a jury as to those lesser included offenses and was thus a violation of Petitioner's due process rights and his right to trial by jury. *See* T.C.A. § 40-18-110(a) (2003).

Petitioner points out that the law at the time of trial did not require the trial court to consider lesser included offenses of felony murder. He cites *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999) and *State v. Ely*, 48 S.W.3d 710 (Tenn. 2001), for the proposition that prior to 1999, trial courts were not required to consider lesser included offenses of felony murder. Following *Burns* and *Ely* however, a trial court's failure to instruct a jury to consider second degree murder, criminally negligent homicide, and reckless homicide, as lesser included offenses of felony murder, was a constitutional violation and cannot be considered harmless error. In a somewhat circular fashion, Petitioner goes on to cite the *Ely* opinion, arguing that "the right to lesser included offense instructions being of constitutional dimension is not a new principle. 'Case law clearly stated that the right to instruction on lesser included offenses derived not only from statute, but also from the constitutional right of trial by jury.'" *Ely*, 48 S.W.3d at 727.

Petitioner asserts that although the decisions in *Burns* and *Ely* were rendered after Petitioner's trial, pursuant to *State v. Lewis*, 36 S.W.3d 88 (Tenn. Crim. App. 2000) and subsequent authority, these cases "have retroactive effect for cases that are 'in the appellate pipeline.'" Although

Petitioner's initial conviction was affirmed by this Court in December 1998, he argues that through no fault of his own his appeal to the supreme court was delayed until the hearing on his post-conviction petition, therefore his case was still in the "appellate pipeline" and *Burns* and *Ely* should apply retroactively.

Petitioner is correct in his assertion that *Burns* and *Ely* apply retroactively to cases that were either in the "appellate pipeline" or pending at the time those decisions were announced. *See e.g. State v. Stokes*, 24 S.W.3d 303 (Tenn. 2000). He is likewise correct that because he was granted a delayed appeal, he was placed in the same position he would have been in had a T.R.A.P. 11 application to appeal been timely filed. *See* Tenn. R. S. Ct. 28 § 9(D). That application, had it been timely filed, could possibly have been pending at the time of the decision in *Burns* in 1999, but not *Ely* in 2001. Had Petitioner raised this issue in his delayed Rule 11 application to appeal, *Burns* likely would have applied retroactively to Petitioner's case. *See e.g. State v. Marlon Orlando Walls*, No. 2003-01854-CCA-R3-CD, 2006 WL 151923, at *9 (Tenn. Crim. App., at Nashville, Jan. 19, 2006), *perm. app. denied* (Tenn. May 30, 2006); *State v. Gregory L. Lofton*, No. M2003-01102-CCA-R3-CD, 2004 WO 2002435, at *5 (Tenn. Crim. App., at Nashville, Sept. 7, 2004) (no Tenn. R. App. P. 11 application filed). However, because Petitioner now raises the issue for the first time in his post-conviction petition, *Burns* and *Ely* do not apply. T.C.A. § 40-30-106(g); *Wiley v. State*, 183 S.W.3d 317, 328 (Tenn. 2006). Pursuant to the supreme court's recent decision in *Wiley v. State*, *Burns* and *Ely* do not apply retroactively in the context of post-conviction cases. *Wiley*, 183 S.W.3d at 328. Accordingly, Petitioner has waived this issue to the extent that he urges this Court to grant relief pursuant to a retroactive application of *Burns* and *Ely*.

Because Petitioner is precluded from a retroactive application of *Burns* and *Ely*, we must evaluate his claim under the standards applicable at the time of Petitioner's trial. At the time of his trial, a trial court was required to "charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so." *See State v. Trusty*, 919 S.W.2d 305, 310 (Tenn. 1996). Defendants were entitled to jury instructions on both lesser-included and lesser-grade offenses. *Id*., T.C.A. § 40-18-110 (1997). As such, Petitioner was entitled to have the trial court consider all lesser included offenses of premeditated first degree murder and felony murder as they existed at the time of his trial.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). In the present case, we conclude that Petitioner has not met his burden of proving by clear and convincing evidence that the trial court did not consider lesser included offenses of premeditated first degree murder and felony murder. Petitioner offered no evidence at the post-conviction hearing to show that the trial judge had not considered lesser included offenses. Indeed, Petitioner's trial counsel testified that it was his belief that the trial court had considered lesser included offenses. In support of his argument on appeal, Petitioner asserts only that the trial court returned a verdict of not guilty with respect to the charge of premeditated first degree murder as proof that the trial court did not consider lesser included

offenses. As it stands now, Petitioner asks us to rely on conjecture and speculation in concluding that the trial court failed to consider lesser included offenses. The law requires clear and convincing evidence which preponderates against the post-conviction court's findings before we can reach such a conclusion. In addition, even if the trial court had found Petitioner guilty of a lesser included offense of premeditated first degree murder (rather than an acquittal under that count) the lesser included offense conviction would have merged with the conviction for felony murder. *State v. Price*, 46 S.W.3d 785, 824-25 (Tenn. Crim. App. 2000). Therefore, there could be no prejudice to Petitioner as to the premeditated first degree murder count.

Additionally, Petitioner has not cited any statute, case law, or other rule of law, and we are not aware of such authority, requiring a trial judge at a bench trial to recite the law of lesser included offenses in order that a defendant may know that the trial judge considered such offenses in rendering the verdict. Nor are we aware of any law requiring the trial judge to make a finding of fact on the record with respect to each lesser included offense he or she considered in deliberations. We presume that the trial court knows the law and that the trial court considers all appropriate lesser included offenses in rendering a decision in a bench trial. Petitioner is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

_____

THOMAS T. WOODALL, JUDGE